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Protection against violence and discrimination based on sexual orientation and gender identity

Note by the Secretariat

The Secretary-General has the honour to transmit to the General Assembly the report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, submitted in accordance with Human Rights Council resolution 32/2.

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Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity

Summary

In the present report, the Independent Expert examines the process of abandoning the classification of certain forms of gender as a pathology and the full scope of the duty of the State to respect and promote respect of gender recognition as a component of identity. He also highlights some effective measures to ensure respect of gender identity and provides guidance to States on how to address violence and discrimination based on gender identity.

I. Introduction

1. The United Nations Human Rights Council has expressed its "grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity" (resolution 17/19), and has created the mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity with the aim of addressing this concern. The present report is presented by the Independent Expert, Victor Madrigal-Borloz, to the General Assembly pursuant to Human Rights Council resolution 32/2.

2. In his previous report to the Human Rights Council (A/HRC/38/43), the Independent Expert presented the different forms of violence and discrimination on the basis of sexual orientation and gender identity and, in particular, their intensity and scope. Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other gender expressions, including dress, speech and mannerisms.[1] In addition, the mandate holder takes into account the distinct life experience of individuals based on the interlinkage of their gender identity with other factors, such as race, ethnicity, migrant status, education and economic status. Political, legal, social and economic contexts are also taken into consideration to understand systemic patterns, such as institutional violence and impunity.

3. Concepts of gender identity vary greatly across the world and a wide range of gender identities and gender expressions exist in all regions as a result of long-established cultures and traditions. Some of the terms used include *hijra* (Bangladesh, India and Pakistan), *travesti* (Argentina and Brazil), *waria* (Indonesia), *okule* and *agule* (Democratic Republic of the Congo and Uganda) *muxe* (Mexico), *fa'afafine* (Samoa), *kathoey* (Thailand) and two-spirit (indigenous North Americans). Some of these and other identities transcend Western concepts of gender identity, gender expression or sexual orientation and, depending on the language, the terms "sex", "gender", "gender identity" and/or "sexual identity" are not always used or distinguished. Cultures and countries from all over the globe, including Australia, Bangladesh, Canada, India, Nepal, New Zealand and Pakistan — together representing a quarter of the world's population[2] — recognize in law and in cultural traditions genders other than male and female.

4. In that connection, the manner in which laws and policies define identity terms has a significant impact on whether and to what extent universally protected human rights are recognized and protected under the law; moreover, the use of terms such as "sex", "gender", "gender identity" and "gender expression" can either give full effect or unduly limit the universal application of human rights.[3]

5. This report uses the term "trans", well-established in United Nations and regional human rights documents to refer to persons who identify with a different gender to the one assigned at birth. While it is well documented that trans persons are a population deeply affected by discrimination and violence based on gender identity,

[1] Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.

[2] Estimate based on United Nations, Department of Economic and Social Affairs, Population Division, World Population Prospects: 2017 Revision. Available at https://esa.un.org/unpd/wpp/Download/Standard/Population/.

[3] Asia Pacific Transgender Network and United Nations Development Programme (UNDP), "Legal gender recognition: a multi-country legal and policy review in Asia", 2017.

all persons have some form of gender identity and, depending on how their gender identity is perceived in a particular context, they can potentially be subject to violence and discrimination on that basis. Consequently, the term "gender diverse" is used in the present report to refer to persons whose gender identity, including their gender expression, is at odds with what is perceived as being the gender norm in a particular context at a particular point in time.

6. The notion that there is a gender norm, from which certain gender identities "vary" or "depart" is based on a series of preconceptions that must be challenged if all humankind is to enjoy human rights. Those misconceptions include: that human nature is to be classified with reference to a male/female binary system on the basis of the sex assigned at birth; that persons fall neatly and exclusively into that system on the same basis; and that it is a legitimate societal objective that, as a result, persons adopt the roles, feelings, forms of expression and behaviours that are considered inherently "masculine" or "feminine." A fundamental part of the system is a nefarious power asymmetry between the male and the female.

7. Gender diversity is illegitimately repressed, generally under the umbrella of culture, religion and tradition (A/HRC/21/42, para. 65), resulting in a variety of normative constructions, the existence and enforcement of which have, over time, reinforced the preconceptions and stereotypes at their origin. Salient among these normative constructions are the interpretation of religious texts, through which certain forms of gender identity have been qualified as sinful; the adoption of laws, through which they have been typified as criminal; and their incorporation into medical classifications as pathologies.

8. In furtherance of the thematic underpinnings identified by the mandate holder in 2017, the present report deals with two thematic areas connected to such constructions: the process of abandoning the classification of certain forms of gender as a pathology (denominated by the Independent Expert and others as "depathologization") and the full scope of the duty of the State to respect and promote respect of gender recognition as a component of identity. In addition to international human rights treaties and the jurisprudence and doctrine of United Nations and regional human rights bodies and special procedures mandate holders, the inputs to the report have included a variety of contributions received from States, United Nations agencies, programmes and funds, regional human rights mechanisms, national human rights institutions, members of civil society organizations, religious communities and interfaith groups, medical professionals, academic institutions and other stakeholders. Those inputs were delivered during a general consultation on 24 and 25 January 2017, in response to a questionnaire sent in May 2017, during an interactive dialogue following the presentation of the first report of the current mandate holder to the Human Rights Council (A/HRC/38/43), during a focused consultation held by the mandate holder on 19 June 2018 and in writing. The Independent Expert is indebted to all stakeholders for their extraordinary contribution to the report.

9. Violence and discrimination connected to the former or current pathologization of sexual orientation will not be addressed in the present report, but will continue to be an area of focus for the mandate holder and will be addressed in future outputs, including reports.

II. The classification of some forms of gender as a pathology

10. The Independent Expert is aware that medical traditions are many, as are the processes of national implementation of classification of diseases. However, in the present report, the choice is made to utilize as point of reference the International

Classification of Diseases[4] maintained by the World Health Organization (WHO), which is the directing and coordinating authority for health within the United Nations system. According to available information, some 70 per cent of psychiatrists around the world use the tenth revision of the International Classification of Diseases more than any other classification system in their daily practice.[5]

11. Until very recently, the tenth revision included trans categories in the chapter on mental and behavioural disorders. For years, and intensively over the last decade, different civil society groups and other stakeholders have worked systematically to challenge that classification. In addition, United Nations and regional human rights experts further called for reforms to end medical classifications and to depathologize trans identities. For example, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health stated that "mental health diagnoses have been misused to pathologize identities and other diversities" and that "the pathologization of lesbian, gay, bisexual, transgender and intersex persons reduces their identities to diseases, which compounds stigma and discrimination" (A/HRC/35/21, para. 48).

12. In June 2018, WHO released the eleventh revision of the Classification,[6] to be considered by the World Health Assembly in May 2019. In that document, the trans categories currently included in the tenth revision have been removed from the chapter on mental and behavioural disorders, and a new category related to trans identities has been created in a chapter on conditions related to sexual health. The category of "transsexualism" was removed and replaced with a new category called "gender incongruence of adolescence and adulthood". The category is not defined in binary terms and does not impose gender stereotypes; it applies only after puberty begins and is characterized by a marked and persistent incongruence between an individual's experienced gender and the assigned sex, which often leads to a desire to "transition" in order to live and be accepted as a person of the experienced gender, through hormonal treatment, surgery or other health-care services to make the individual's body align, as much as desired and to the extent possible, with the experienced gender.

13. The new category in the eleventh revision is intended to be used to facilitate access to gender-affirming treatment. In other words, there is no reason to assign a diagnosis to trans people who do not seek gender-affirming medical treatment or some sort of bodily change. The mandate holder has received consistent information to the effect that these changes are considered a major step forward in terms of respect for gender identity and gender diversity.[7]

14. The mandate holder welcomes the measures described above, as this reclassification will have a significant impact on the wrong perception of some forms of gender as a pathology, will promote the visibility of those forms of gender and will allow individuals to access better health care. In this connection, the mandate holder notes that pathologization has had a deep impact on public policy, legislation and jurisprudence, thus penetrating all realms of State action in all regions of the world and permeating the collective conscience. Eradicating the conception of some forms of gender as a pathology from everyday life will be a long and difficult process and

[4] Available at http://www.who.int/classifications/icd/en/.

[5] Geoffrey Reed and others, "The WPA-WHO global survey of psychiatrists' attitudes towards mental disorders classification", *World Psychiatry*, vol. 10, No. 2, June 2011.

[6] Available at https://icd.who.int/browse11/l-m/en.

[7] Oral and written submissions during the open consultation of 19 June 2018; submission by Global Action for Trans Equality (GATE), Transgender Europe, Iranti-Org and Stop Trans Pathologization (STP), December 2016; Sam Winter, expert opinion submitted to the mandate holder, June 2018.

the mandate holder is convinced that strong proactive measures will be required to that end.

15. The diagnosis of "gender identity disorder of childhood" has been replaced with "gender incongruence of childhood" in the eleventh revision, a diagnosis that will be used only with pre-pubertal children. This measure has been criticized by several organizations and professionals whose position is that it creates a diagnosis for a situation not requiring medical treatment, that other codes exist to capture any related needs of children who may face discrimination based on their gender identity or expression, and that the existence of this diagnosis perpetuates a pathologizing approach to gender diversity.[8] Proponents of retaining the diagnosis consider that it will satisfy specific clinical needs and provide opportunities for education and informed consent, developing standards and pathways of care to guide clinicians and family members, as well as research efforts, and that it alleviates concerns about restricting access to reimbursed health care.[9]

16. The Independent Expert has taken note of the controversy surrounding the diagnosis of gender incongruence of childhood in the eleventh revision, and the arguments that are raised for and against it, and is deeply concerned that in both cases the arguments rest on the potentially significant effects on the enjoyment of human rights by trans and gender-diverse children. The mandate holder recognizes the seriousness of the risks identified by the proponents of the category, but remains concerned by the fact that such classifications have been shown to be obstacles to the full enjoyment of human rights by trans people, especially when they are applied in a way to restrict legal capacities or choice.[10] The mandate holder therefore considers that this discussion could significantly benefit from the analysis of the available evidence in the light of the rights of the child to gender identity and emerging autonomy[11] and the vigorous framework for protection existing in the nearly universally ratified Convention on the Rights of the Child. The mandate holder encourages all relevant stakeholders, including the populations affected, to participate in that process. Given its importance and relevance to the objectives of Human Rights Council resolution 32/2, the Independent Expert will remain seized of this matter.

III. Violence and discrimination resulting from the lack of State recognition of gender identity

17. Within international human rights law, there is a well-established framework prescribing respect for gender identity. Consistently, United Nations treaty bodies have affirmed in their doctrine that sexual orientation and gender identity, including gender expression, are prohibited grounds for discrimination, just like race, sex,

[8] Mauro Cabral and others, "Removal of gender incongruence of childhood diagnostic category: a human rights perspective", *The Lancet Psychiatry*, vol. 3, No. 5, May 2016.

[9] Jack Drescher and others, "Gender incongruence of childhood in the ICD-11: controversies, proposal, and rationale", *The Lancet Psychiatry*, vol. 3, No. 3, March 2016; and Jack Drescher and others, "Removal of gender incongruence of childhood diagnostic category: a human rights perspective — authors' reply", *The Lancet Psychiatry*, vol. 3, No. 5, May 2016.

[10] Council of Europe, Commissioner for Human Rights, "Human rights and gender identity", p. 10. Available at https://rm.coe.int/16806da753.

[11] Committee on the Rights of the Child, general comment No. 20 (2016) on the implementation of the rights of the child during adolescence, paras. 33 and 34.

colour or religion;[12] United Nations human rights mechanisms have also expressed concern with regard to human rights violations based on gender identity, including gender expression, and have called on States to address such violations.[13]

18. This framework notwithstanding, United Nations human rights mechanisms continue to receive reports of transphobic violence committed in all regions, including physical violence (such as murder, beatings, kidnapping and sexual assault) and psychological violence (such as threats, coercion and the arbitrary deprivation of liberty, including forced psychiatric incarceration).[14] It is further reported that, when trying to denounce violence and seek police protection, trans persons are subjected to harassment, humiliation, abuse or arrest, based, inter alia, on the fact that their gender identity was not recognized.[15] Lack of recognition of gender identity may also lead to violations of human rights in other contexts, including torture and ill-treatment in medical and detention settings, sexual violence and coerced medical treatment.[16]

A. Legal basis for State recognition of gender identity

19. In its recent advisory opinion OC-24/17,[17] the Inter-American Court of Human Rights established that the very basis of individual rights is the right of persons to be recognized as unique and distinguishable from others. The Court established that aspects of personality that are fundamental to this right must be respected with no other limitations than those imposed by the rights of other persons and that "consolidating the individuality of the person before the State and before society implies having the legitimate authority to establish the exteriorization of their persona according to their most intimate convictions",[18] in close connection with self-determination, self-perception, dignity and liberty.[19]

20. This finding is equally representative of the basis of the rights enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The right to effective recognition of one's gender identity is linked

[12] See, for example, Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, para. 27; Human Rights Committee, communication No. 488/1992, *Toonen v. Australia*; Committee on the Rights of the Child, general comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health, para. 8; Committee against Torture, general comment No. 2 (2008) on the implementation of article 2 by States parties, para. 21, and Committee against Torture, general comment No. 3 (2012) on the implementation of article 14 by States parties, paras. 32 and 39.

[13] See, for example, A/HRC/29/23, paras. 21 and 36; Committee on Economic, Social and Cultural Rights, general comment No. 22 (2016) on the right to sexual and reproductive health, paras. 23 and 40; Committee on the Rights of the Child, general comment No. 20 (2016) on the implementation of the rights of the child during adolescence, paras. 33 and 34; A/HRC/29/33/Add.1, paras. 86, 88 and 111 (q); CCPR/C/KWT/CO/3, paras. 12 and 13; and CCPR/C/RUS/CO/7, para. 10.

[14] See CCPR/C/VEN/CO/4, para. 8; CCPR/C/UKR/CO/7, para. 10; CCPR/C/SUR/CO/3, para. 27; CAT/C/KWT/CO/2, para. 25; and CAT/C/KGZ/CO/2, para. 19; see also recent communications sent by special procedures mandate holders on this topic: IDN 1/2018, EGY 17/2017, AZE 2/2017, HND 6/2017, HND 5/2017 and SLV 2/2017. Available at https://spcommreports.ohchr.org/TmSearch/Results.

[15] See A/HRC/29/33/Add.1, para. 86; CCPR/C/SUR/CO/3, paras. 27 and 28; Office of the United Nations High Commissioner for Human Rights (OHCHR), press briefing note on Turkey, Israel/Occupied Palestinian Territory and Yemen, 14 July 2015.

[16] A/HRC/29/23, paras. 34–38 and 54.

[17] Inter-American Court of Human Rights, advisory opinion OC-24/17, 24 November 2017. Available at http://www.corteidh.or.cr/docs/opiniones/seriea_24_eng.pdf.

[18] Ibid., para. 91.

[19] Yogyakarta Principles, principle 6.

to the right to equal recognition before the law established in article 6 of the Universal Declaration of Human Rights, subsequently set out in international human rights law, beginning with article 16 of the International Covenant on Civil and Political Rights,[20] and also present in other universal human rights treaties and regional human rights instruments.[21]

21. In turn, the principles of freedom and autonomy directly contradict the idea that a person is born to play a certain role in society. Self-determined gender is a fundamental part of a person's free and autonomous choice in relation to roles, feelings, forms of expression and behaviours, and a cornerstone of the person's identity.[22] The resulting obligation of States is to provide access to gender recognition in a manner consistent with the rights to freedom from discrimination, equal protection of the law, privacy, identity and freedom of expression.[23]

22. The right to equal recognition before the law is also a central tenet for other rights and freedoms. In practice, it is connected to entitlements in relation to health, education, housing, access to social security and employment insofar as the actualization by the State bureaucracy of all of these entitlements depends on the identification of the individual.[24]

23. Indeed, lack of legal recognition negates the identity of the concerned persons to such an extent that it provokes what can be described as a fundamental rupture of State obligations. As expressed by one scholar, when States deny legal access to trans identities, what they are actually doing is messaging a sense of what is a proper citizen. Trans and gender-diverse persons whose identity is not adequately recognized suffer denial of the right to health;[25] discrimination, exclusion and bullying in education contexts;[26] discrimination in employment,[27] housing and access to social security; violations of the rights of the child; and arbitrary restrictions on the rights to freedom of expression, peaceful assembly and association,[28] the right to freedom of movement and residence, and the right to leave any country including one's own.

24. Similarly, equal recognition before the law is a basic element in a well-functioning framework for protection from arbitrary arrest and detention, torture and ill-treatment, as it is well established that in all situations of deprivation of liberty, the proper identification of the individual is the first guarantee of State accountability.

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[20] See, for example, CCPR/C/IRL/CO/3, para. 8; and CCPR/C/SRB/CO/3, paras. 12 and 13.

[21] Convention on the Elimination of All Forms of Discrimination against Women, art. 15; Convention on the Rights of the Child, art. 8; Convention on the Rights of Persons with Disabilities, art. 12; American Convention on Human Rights, art. 3; and African Charter on Human and Peoples' Rights, art. 5.

[22] Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas* (2015), para. 16.

[23] See CCPR/C/AUS/CO/6, paras. 27 and 28; CCPR/C/ROU/CO/5, paras. 15 and 16; CCPR/C/KAZ/CO/2, paras. 9 and 10; CCPR/C/UKR/CO/7, para. 10; CCPR/C/IRL/CO/3, para. 8; CCPR/C/UKR/CO/7, para. 10; CEDAW/C/BEL/CO/7, paras. 44 and 45; Committee on the Rights of the Child, general comment No. 20 (2016) on the implementation of the rights of the child during adolescence, para. 34; and A/HRC/14/22/Add.2, para. 92.

[24] OHCHR, "Living free and equal" (New York and Geneva, 2016), p. 94.

[25] UNDP, "Transgender health and human rights: discussion paper", 2013.

[26] United Nations Educational, Scientific and Cultural Organization (UNESCO), *Out in the Open: Education Sector Responses to Violence based on Sexual Orientation and Gender Identity Expression*, (Paris, 2016).

[27] E/C.12/CRI/CO/5, paras. 20 and 21.

[28] A/HRC/29/23, paras. 60–62.

B. De jure or de facto criminalization of gender identity

25. The vast majority of trans and gender-diverse persons in the world, however, do not have access to gender recognition by the State.[29] They may live in a legal vacuum, in which case it is likely that stigma and prejudice will create a climate that tacitly permits, encourages and rewards with impunity the acts of violence and discrimination against them, and leads to a situation of de facto criminalization.

26. Persecution is also enabled through the use of laws or by-laws that criminalize persons based on their identity or expression, for example, those based on public decency, public morals, public health and security, and laws that criminalize conduct seen as "indecent" or "provocative".[30] This includes dress codes that subject women to punishment for wearing clothing not seen as pertaining to their assumed gender, or the explicit criminalization of so-called "cross-dressing" or "imitation of the opposite sex".[31] In addition, laws criminalizing sex work tend to be used disproportionately against trans persons, exacerbating police abuse and drawing them into the criminal justice system, sometimes leading to further incidents of discrimination and violence.[32]

27. The mandate holder also notes the emergence in certain regions of the world of a populistic discourse that seeks to delegitimize the plight of persons discriminated against on the basis of sexual orientation or gender identity through an attempt to rebrand the term "gender ideology". In its original sense, the term, coined in the 1970s and utilized in the work of, among others, political scientist Rule Krauss[33] refers precisely to the binary system of preconceptions and predetermined gender-based power asymmetries that must be challenged if all humankind is to fully enjoy human rights. In its alternative and recent iteration, however, it is being used as part of an anti-rights discourse by political and religious leaders seeking to limit the human rights of lesbian, gay, bisexual, trans and gender-diverse persons, under the assertion that the work to promote the human rights of these persons constitutes countercultural or antisocial behaviour. The mandate holder considers that some of the anti-rights discourse warrants examination under the parameters of hate speech and will develop the theme in future outputs, including reports.

C. Abusive requirements for gender recognition

28. Some States recognize the gender identity of trans persons, but establish abusive requirements for such recognition that further violate human rights when a change of gender or name is sought in official records: forced, coerced or otherwise involuntary sterilization;[34] medical procedures related to transition, including surgeries and hormonal therapies; undergoing medical diagnosis, psychological appraisals or other

[29] Zhan Chiam, Sandra Duffy and Matilda González Gil, "Trans legal mapping report: recognition before the law", 2nd ed. (Geneva, International Lesbian, Gay, Bisexual, Trans and Intersex Association, 2017); and Asia Pacific Transgender Network and UNDP, "Legal gender recognition".

[30] A/HRC/38/43/Add.1, paras. 55–63; and CCPR/C/KWT/CO/3, paras. 12 and 13.

[31] A/HRC/29/33/Add.1, paras. 88 and 89; E/C.12/GUY/CO/2-4, paras. 24 and 25; and CCPR/C/KWT/CO/2, para. 30.

[32] A/HRC/38/43, para. 56.

[33] Wilma Rule Krauss, "Political implications of gender roles: a review of the literature", *The American Political Science Review*, vol. 68, No. 4 (December 1974).

[34] In cases adjudicated by the United Nations Human Rights Committee, the Committee has ruled that suffering in a sexual and reproductive health context can amount to cruel, inhuman or degrading treatment in violation of article 7 of the International Covenant on Civil and Political Rights (see CCPR/C/116/D/2324/2013, para. 7.6; CCPR/C/101/D/1608/2007, para. 9.2; and CCPR/C/85/D/1153/2003, para. 7).

medical procedures[35] or treatment; as well as third-party consent for adults, forced divorce and age-of-offspring restrictions.

29. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has indicated that "these practices are rooted in discrimination on the basis of sexual orientation and gender identity, violate the rights to physical integrity and self-determination of individuals and amount to ill-treatment or torture".[36] The European Court of Human Rights has found the requirement to undergo those procedures a violation of the principles of bodily autonomy and self-determination,[37] and multiple findings from treaty bodies include recommendations to States to eliminate such requirements.[38]

30. United Nations and regional human rights experts have highlighted that "forced, coercive and otherwise involuntary treatments and procedures can lead to severe and life-long physical and mental pain and suffering and can violate the right to be free from torture and other cruel, inhuman or degrading treatment or punishment".[39] United Nations entities have also highlighted that "sterilization requirements run counter to respect for bodily integrity, self-determination and human dignity, and can cause and perpetuate discrimination against transgender and intersex persons".[40] They have held that such violations are contrary to the obligations of States under international human rights law and should be prohibited.[41]

31. Some State actions may create a risk of destroying life plans, such as the case before the Human Rights Committee concerning a trans woman who was informed that she would have to divorce her female spouse in order to obtain an updated birth certificate (see CCPR/C/119/D/2172/2012).

32. Even requirements that may at first seem neutral can become unacceptable hindrances or be utilized to obstruct respect for gender identity. In the latest concluding observations on Australia, the Human Rights Committee noted, inter alia, the delays associated with the process of authorization that was required for hormone treatment and expressed concern that the success of treatment could be compromised as a result (CCPR/C/AUS/CO/6, paras. 27 and 28). Indeed, according to information submitted to the mandate holder, it is often the case that procedures take years to be

[35] See CCPR/C/119/D/2172/2012, CCPR/C/SVK/CO/4, paras. 14 and 15; CCPR/C/IRL/CO/3, para. 8; CCPR/C/IRL/CO/4, para. 7; CCPR/C/UKR/CO/7, para. 10; CEDAW/C/CHE/CO/4-5, paras. 38 and 39; CEDAW/C/NLD/CO/5, paras. 46 and 47; CCPR/C/KOR/CO/4, paras. 14 and 15; CAT/C/CHN-HKG/CO/5, para. 29 (a); A/HRC/22/53, paras. 78 and 88; Committee on Economic, Social and Cultural Rights, general comment No. 22 (2016) on the right to sexual and reproductive health, para. 58; World Health Organization, *Eliminating Forced, Coercive and Otherwise Involuntary Sterilization: an Interagency Statement* (Geneva, 2014); OHCHR, "Discriminated and made vulnerable: young LGBT and intersex people need recognition and protection of their rights — International Day against Homophobia, Biphobia and Transphobia", 13 May 2015. Available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15941&LangID=E.

[36] A/HRC/31/57, para. 49.

[37] European Court of Human Rights, *Case of A.P., Garçon and Nicot v. France*, application Nos. 79885/12, 52471/13 and 52596/13, judgment of 6 April 2017.

[38] See CCPR/C/SVK/CO/4, paras. 14 and 15; CCPR/C/IRL/CO/3, para. 8; CCPR/C/IRL/CO/4, para. 7; CCPR/C/UKR/CO/7, para. 10; CCPR/C/KOR/CO/4, paras. 14 and 15; CEDAW/C/CHE/CO/4-5, paras. 38 and 39; CEDAW/C/NLD/CO/5, paras. 46 and 47; and CAT/C/CHN-HKG/CO/5, para. 29 (a).

[39] OHCHR, "Psychologization: being lesbian, gay, bisexual and/or trans is not an illness", statement for the International Day against Homophobia, Transphobia and Biphobia, 12 May 2016. Available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19956&LangID=E.

[40] World Health Organization, *Eliminating Forced, Coercive and Otherwise Involuntary Sterilization*.

[41] Ibid.

completed[42] and the long waiting lists often contribute to several social problems and result in drug and alcohol abuse and self-medication with hormones, with severe negative health consequences.[43]

D. Recognition of the gender identity of children

33. Many States assume that children are not able to consent to gender recognition procedures. Children are thus often de jure and de facto excluded from gender recognition with the corresponding heightened risk of persecution, abuse, violence and discrimination. Despite many legal reforms in recent years to allow and facilitate gender self-determination, few countries allow children to change their legal gender to their self-determined gender and, when they do, a minimum age is normally set.[44]

34. Trans and gender-diverse children and adolescents are protected from discrimination based on gender identity.[45] In its general comment No. 20 (2016) on the implementation of the rights of the child during adolescence, the Committee on the Rights of the Child stated:

> "Adolescents who are ... transgender ... commonly face persecution, including abuse and violence, stigmatization, discrimination, bullying, exclusion from education and training, as well as a lack of family and social support, or access to sexual and reproductive health services and information. In extreme cases, they face sexual assault, rape and even death. These experiences have been linked to low self-esteem, higher rates of depression, suicide and homelessness ...
>
> The Committee emphasizes the rights of all adolescents to freedom of expression and respect for their physical and psychological integrity, gender identity and emerging autonomy. ... States should also take effective action to protect [...] transgender [...] adolescents from all forms of violence, discrimination or bullying by raising public awareness and implementing safety and support measures."[46]

35. Furthermore, States should take the best interests of the child as a primary consideration and respect the child's right to express views in accordance with the age and maturity of the child, in line with the Convention on the Rights of the Child[47] and, in particular, in keeping with the safeguards established pursuant to article 19 of the Convention, which must not be excessive or discriminatory in relation to other safeguards that give recognition to the autonomy and decisional power of children of a certain age in other areas. States should also fulfil their obligation to ensure to the

[42] Transgender Legal Defense Project, "Transgender people in Russian society", p. 5. Available at http://pravo-trans.eu/wp-content/uploads/2018/06/transgender-people-in-russian-society.pdf.

[43] Submission by Transgender Netwerk Nederland, June 2018.

[44] Submission by Child Rights International Network, June 2017. For more data on legal recognition of gender identity in European countries, see https://rainbow-europe.org/#8661/8701/0.

[45] Committee on the Rights of the Child, general comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health, para. 8.

[46] Committee on the Rights of the Child, general comment No. 20 (2016) on the implementation of the rights of the child during adolescence, paras. 33 and 34.

[47] Arts. 3 (1) and 12; and Committee on the Rights of the Child, general comments No. 12 (2009) on the right of the child to be heard and No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration.

maximum extent possible the survival and development of the child[48] and the creation of an environment that respects human dignity.[49]

E. Data and official documentation

36. While every person must be protected from discrimination and violence, the risk for trans and gender-diverse persons is exacerbated when their name and sex details in official documents do not match their gender identity or expression: as recorded by United Nations human rights mechanisms, trans persons have been subjected to harassment, humiliation, abuse or arrest upon attempting to report the attacks and seek police protection, based, inter alia, on the fact that their self-determined gender was not recognized in their official documents.[50] This may result in greater levels of violence and extortion; exclusion from school and the official labour market; and restrictions on access to housing, health-care[51] and other social services, and on being able to cross borders. During emergencies, such as natural disasters or humanitarian crises, discrimination and violence are a particular risk, and the lack of identity documents matching the gender of the person may have even greater ramifications, for example, when seeking access to emergency care, services and protection measures.[52]

37. Indeed, official documentation and data are extremely relevant to the enjoyment of rights. From the manifestation of initial data in the form of birth certificates, which are reflected afterwards in identification cards, driving licences and passports, to that of the most intimate information, such as health records, the manner in which data reflects the identity of the individual is a fundamental consequence for the enjoyment of the right to equal recognition. Legal systems must, on an ongoing basis, carefully review the reasoning behind the gathering and exhibition of certain data, and the rules governing data management, which must include separate considerations for the need to gather and the need to exhibit. In this connection, the mandate holder has significant doubts as to the real need for the pervasive exhibition of gender markers in official and non-official documentation, which appears to be fulfilling the vestiges of needs that have long been superseded or adhering to a rationale that should have never been applied in the first place. The simple principle remains that States must refrain from gathering and exhibiting data without a legitimate, proportionate and necessary purpose.

38. Furthermore, when data must be collected, it must be done on the basis of self-identification and, as appropriate and relevant, on the basis of privacy and confidentiality.[53] In this respect, the United Nations High Commissioner for Human Rights and treaty bodies have recommended that States issue legal identity documents that reflect the gender of the person concerned based on self-determination.[54]

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[48] Art. 6; and Committee on the Rights of the Child, general comment No. 5 (2003) on general measures of implementation of the Convention.

[49] See https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=16223.

[50] See A/HRC/29/33/Add.1, para. 86; CCPR/C/SUR/CO/3, paras. 27 and 28; and OHCHR, press briefing note on Turkey, Israel/Occupied Palestinian Territory and Yemen, 14 July 2015.

[51] A/HRC/35/21, para. 58.

[52] A/HRC/38/43, para. 43.

[53] See CEDAW/C/SVK/CO/5-6, para. 38; and OHCHR, "A human rights-based approach to data: leaving no one behind in the 2030 Agenda for Sustainable Development", 2018. Available at https://www.ohchr.org/Documents/Issues/HRIndicators/GuidanceNoteonApproachtoData.pdf.

[54] See A/HRC/29/23, para. 79 (i).

F. Recognition procedures

39. In February 2017, on the basis of the legal obligation of non-discrimination, the recommendations by United Nations human rights mechanisms[55] and a survey of international good practices, the United Nations High Commissioner for Human Rights recommended certain features for the process of recognition, with which the mandate holder concurs. Under those parameters, the process of recognition should:

- Be based on self-determination by the applicant
- Be a simple administrative process
- Not require applicants to fulfil abusive requirements, such as medical certification, surgery, treatment, sterilization or divorce
- Acknowledge and recognize non-binary identities, such as gender identities that are neither "man" nor "woman"
- Ensure that minors have access to recognition of their gender identity

40. The High Commissioner further stated that judicial procedures may create significant additional barriers to accessing legal recognition of gender identity, unnecessarily prolong the process and create additional financial burdens, noting that they may constitute disproportionate and unnecessary intrusion into the exercise of individual rights, particularly where a judge is asked to determine the validity of a person's gender identity, which is a deeply personal and intimate matter.

IV. Effective measures to ensure respect of gender identity

41. At different levels, there are multiple sources supporting the effective implementation of measures. The following is a non-exhaustive list of such measures, presented with the purpose of informing States in the furtherance of their obligation to address violence and discrimination on the basis of gender identity, including particular measures to ensure legal recognition.

A. Global

42. In 2016, the Committee on the Rights of the Child and a group of United Nations human rights experts, the Inter-American Commission on Human Rights, the African Commission on Human and Peoples' Rights and the Commissioner for Human Rights of the Council of Europe urged Governments worldwide to reform medical classifications and to adopt measures to prevent all forms of forced treatments and procedures on lesbian, gay, bisexual and trans persons.[56] The United Nations Development Programme developed an assessment tool to allow countries to consider whether and to what extent current laws, policies, regulations and practices enable access to gender recognition in a way that meets human rights standards.[57]

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[55] See A/HRC/29/23, para. 79 (i); OHCHR, "Living free and equal", p. 94–96; CCPR/C/IRL/CO/3, para. 8; CCPR/C/IRL/CO/4, para. 7; CCPR/C/UKR/CO/7, para. 10; CCPR/C/KOR/CO/4, paras. 14 and 15; CEDAW/C/NLD/CO/5, paras. 46 and 47; CAT/C/CHN-HKG/CO/5, para. 29 (a); Committee on Economic, Social and Cultural Rights, general comment No. 22 (2016) on the right to sexual and reproductive health, para. 58; A/HRC/22/53, paras. 78 and 88; World Health Organization, *Eliminating Forced, Coercive and Otherwise Involuntary Sterilization*; and OHCHR, "Discriminated and made vulnerable".

[56] OHCHR, "Pathologization: being lesbian, gay, bisexual and/or trans is not an illness.

[57] Asia Pacific Transgender Network and UNDP, "Legal gender recognition", p. 11.

43. In 2017, a number of United Nations experts and the Inter-American Commission on Human Rights, the African Commission on Human and People's Rights and the Council of Europe released a statement calling on States to facilitate quick, transparent and accessible gender recognition without abusive conditions, including for young trans people.[58]

B. Regional

44. In 2009, the Commissioner for Human Rights of the Council of Europe published an issue paper maintaining that "from a human rights and health-care perspective no mental disorder needs to be diagnosed in order to give access to treatment for a condition in need of medical care".[59] This position was subsequently adopted by the European Parliament in its resolution of 28 September 2011 on human rights, sexual orientation and gender identity.[60] The European Parliament, in its resolution of 4 February 2014, reiterated that "the Commission should continue working within the World Health Organization to withdraw gender identity disorders from the list of mental and behavioural disorders and to ensure a non-pathologizing reclassification in the negotiations on the eleventh version of the International Classification of Diseases".[61] In 2015, the Parliamentary Assembly of the Council of Europe called upon member States to "amend classifications of diseases used at national level and advocate the modification of international classifications, making sure that trans people, including children, are not labelled as mentally ill, while ensuring stigma-free access to necessary medical treatment".[62]

45. In April 2017, the European Court of Human Rights found that compulsory sterilization as a prerequisite for access to gender recognition procedures is contrary to the European Convention on Human Rights.[63] This judgment prompted a series of law reform processes across the member States of the Council of Europe, as 20 of them were still requiring that trans persons be sterilized to access gender recognition. It is reported that 14 European States still require this practice.[64]

46. The Organization of American States has, for the last decade, developed the Inter-American Program for Universal Civil Registry and the Right to Identity, which seeks to promote best practices and standards for civil registry systems.[65] On 24 November 2017, the Inter-American Court of Human Rights issued an advisory opinion (OC-24/17) on State obligations under the American Convention on Human Rights with regard to providing quick, transparent and accessible gender recognition

[58] OHCHR, "Embrace diversity and protect trans and gender diverse children and adolescents", 16 May 2017. Available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21622.

[59] Council of Europe, Commissioner for Human Rights, "Human rights and gender identity". Available at https://rm.coe.int/16806da753.

[60] European Parliament resolution of 28 September 2011 on human rights, sexual orientation and gender identity at the United Nations. Available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0427+0+DOC+XML+V0//EN.

[61] European Parliament resolution of 4 February 2014 on the European Union Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity. Available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0062+0+DOC+XML+V0//EN.

[62] Council of Europe, Parliamentary Assembly resolution 2048 (2015) on discrimination against transgender people in Europe. Available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21736.

[63] European Court of Human Rights, *Case of A.P., Garçon and Nicot v. France*.

[64] See https://tgeu.org/press-release-trans-rights-map-2018/.

[65] General Assembly of the Organization of American States, resolution AG/RES. 2362 (XXXVIII-O/08), specific measures Nos. 2 (g) and (i).

without abusive requirements, with due respect for free and informed choice and personal integrity.

47. The resolution on protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity (resolution 275), adopted by the African Commission on Human and Peoples' Rights at its 55th ordinary session, held in Luanda in 2014, takes as its point of departure the premise that, under the African Charter, sexual orientation and gender identity are grounds for protection from violence and other human rights violations, including discrimination. Most recently, the Commission issued a non-exhaustive list of grounds for discrimination, which includes gender and gender identity, in its general comment No. 4.[66]

C. National

1. Legislative measures

Depathologizing through the law

48. Some States have moved towards the depathologization of trans persons in the health system while ensuring their access to appropriate treatment, as is the case of Argentina, Denmark and Malta. Legislation depathologizing trans identities has typically been adopted in conjunction with, prior to or in the wake of gender identity laws.

49. In Argentina, in 2010 the State adopted the National Mental Health Law, which prohibited establishing a diagnosis in the mental health field on the sole basis of "sexual identity".[67] In 2016, Malta adopted legislation that depathologized a person's sexual orientation, gender identity and gender expression while ensuring stigma-free access to trans-specific health care for adults and minors.[68] The same year, the Parliament of Denmark decided to remove trans categories from the section on mental and behavioural disorders of the Danish health administration system. The change came into effect on 1 January 2017.[69]

50. Other States took similar steps towards the declassification of diverse gender identities as pathologies. For example, in Sweden various diagnostic codes related to trans identities were removed from the Swedish version of the tenth revision of the International Classification of Diseases in 2009, citing that they were potentially offensive and could contribute to prejudice.[70] France removed transsexuality from the list of long-term psychiatric conditions in 2010. Since then, several other States have been moving away from approaching gender variance as a psychiatric disorder. For instance, in Hungary, the Psychiatry and Psychotherapy Section and Council of the Professional College for Health issued an opinion in 2013, at the request of the Government, asserting that transsexualism cannot be considered a mental disorder.

Legal recognition of gender identity

51. As noted by the United Nations High Commissioner for Human Rights, the inclusion of gender identity as protected grounds from discrimination in

[66] See http://www.achpr.org/files/instruments/general-comment-right-to-redress/achpr_general_comment_no._4_english.pdf.

[67] National Mental Health Law, Law No. 26.657 of 2010. Available at http://servicios.infoleg.gob.ar/infolegInternet/anexos/175000-179999/175977/norma.htm.

[68] Act No. LV of 2016 and the Gender Identity, Gender Expression and Sex Characteristics Act, as amended in 2016.

[69] See http://www.ft.dk/samling/20161/almdel/suu/bilag/125/1707120.pdf.

[70] See http://tgeu.org/wp-content/uploads/2017/02/2.11-TGEU_BestPracticeCatalogue.pdf.

constitutional texts has proved to be the best practice. This approach has been taken in the Plurinational State of Bolivia,[71] Fiji and Malta.[72]

52. To date, 10 countries around the world have adopted a legislative model of recognition based on self-determination: Argentina in 2012; Denmark in 2014; Colombia Ireland and Malta in 2015; Norway in 2016; Belgium in 2017; and Austria, Brazil and Pakistan in 2018. Among these, Belgium and Denmark impose a waiting period of several months.

53. Argentina adopted a pioneering law on gender identity in 2012, establishing a process free of the abusive requirements of medical diagnosis, medical treatment, sterilization and divorce, and also guaranteeing access to hormone treatment and gender-affirming surgical interventions based on free and informed consent. Under a model that is considered to be the best practice by the mandate holder, the law also establishes the State's obligation to cover gender-affirming health care.[73]

54. The law on gender identity of Argentina establishes a simple administrative process based on self-determination for the modification of name and sex markers on official documents through the civil registry, without any abusive requirements.[74] Similar processes are also in place in Austria,[75] Belgium,[76] Denmark,[77] Ireland,[78] Malta[79] and Norway.[80]

55. Uruguay[81] has also adopted legislation allowing for changes to names and sex markers on official documents without prior judicial approval, but it is reported that the applicant must demonstrate a history of gender dysphoria, as is the case in the United Kingdom of Great Britain and Northern Ireland.[82] Similarly, in Slovenia, the rules on the implementation of the law on the central register[83] define legal gender recognition as a relatively quick administrative procedure, however, a medical certificate is required. The procedure to apply for a name change is separate from the procedure for obtaining a new gender marker and does not require a medical certificate. The procedure for changing one's name is accessible to minors (with parental consent), whereas the procedure for changing one's gender marker is not.[84] In Australia, the sex identifier can be changed to M (male), F (female) or X (indeterminate/intersex/unspecified) on passports, and gender markers can be

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[71] Submissions by the Office of the Ombudsperson, TREBOL and Fundación Diversencia, June 2017.

[72] OHCHR, "Living free and equal", chap. 4.2.

[73] Law on Gender Identity, Law 26.743 of 2012. Available at http://servicios.infoleg.gob.ar/infolegInternet/anexos/195000-199999/197860/norma.htm.

[74] Ibid.

[75] See http://www.rklambda.at/index.php/en/news-en/361-austrian-constitutional-orders-immediate-third-gender-recognition.

[76] See http://www.ejustice.just.fgov.be/eli/loi/2017/06/25/2017012964/justel.

[77] See https://tgeu.org/sites/default/files/Denmark_Civil_Registry_law.pdf.

[78] See https://www.oireachtas.ie/en/bills/bill/2014/116/.

[79] See http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12312&l=1.

[80] Submissions to the mandate holder.

[81] Uruguay, Act No. 18,620 of 25 October 2009, art. 4, cited in advisory opinion OC-24/17 of the Inter-American Court of Human Rights.

[82] Submission by Stonewall, June 2017.

[83] Official Gazette of the Republic of Slovenia, Nos. 40/05 and 69/09.

[84] Joint submission by LGBTI Equal Rights Association for Western Balkans and Turkey (ERA), PINK Embassy Albania, Streha LGBT (Shelter), Pro LGBT, Centre for Equality and Liberty of the LGBT community in Kosovo (CEL Kosova), Subversive Front, Coalition Margins, Association Spectra, Egal, Gayten — LGBT, Legebitra, TransAkcija Institute, Pembe Hayat and Social Policies, Gender Identity, and Sexual Orientation Studies Association (SPoD), "Report on legal gender recognition in the Western Balkans and Turkey", June 2018. Available at http://www.lgbti-era.org/one-stop-shop/report-legal-gender-recognition-western-balkans-and-turkey.

amended in federal government records, but in both cases a statement from a medical practitioner or a psychologist is required.[85]

Right to privacy and confidentiality

56. Under articles 6 and 9, the law on gender identity of Argentina provides for safeguards in terms of protection of the right to privacy, with restrictions on access to the original birth registration and the full confidentiality of the sex and name changes in the records.

Children and legal recognition of gender identity

57. In Europe, eight countries have no age restrictions on applying for gender recognition: Austria, Azerbaijan, Croatia, Estonia, Germany, Malta, Republic of Moldova and Switzerland. In Belgium, Ireland, the Netherlands and Norway children aged 16 years and over can obtain gender recognition. Norway also currently allows minors aged between 6 and 16 years to apply for gender recognition with a parent or guardian; and Luxembourg has a bill under consideration that would extend to minors over the age of 5.[86] Under article 5, the law on gender identity of Argentina authorizes applications for persons under the age of 18, as long as they are submitted through representatives and with the express consent of the child, who shall be represented by a lawyer; is it noteworthy that the law explicitly mentions the Convention on the Rights of the Child, a good practice to ensure that the *corpus juris* on child rights is respected in the letter and application of the law.

Partial removal of abusive requirements

58. In October 2017, the Parliament of Greece removed the need for trans persons to undergo sterilization to have their gender legally recognized, but it is reported that other abusive requirements remain.[87] On 8 May 2018, the National Assembly of Pakistan passed the Transgender Persons (Protection of Rights) Act 2018, which seeks to protect the rights of trans persons and includes provisions to change gender, based on self-determination, on a driver's licence and passport and in the records of the National Database and Registration Authority.

Reparations

59. On 21 March 2018, the Parliament of Sweden took the decision to pay compensation to trans people who were coercively sterilized between 1972 and 2013 in order to have their gender legally recognized and become legitimate citizens of their communities.[88] Between 600 and 700 people are eligible for the compensation of €22,500. Sweden is the first country in the world to compensate trans people for the severe human rights violation of coerced sterilizations.[89]

2. Judicial action

60. Decisions from justice agencies have often pointed the way to improved protection for the gender identity of trans persons.

[85] Submissions by the Australian Human Rights Commission, 2017 and 2018.

[86] Chiam and others, "Trans legal mapping report". See also https://rainbow-europe.org.

[87] See https://www.ilga-europe.org/resources/news/latest-news/greece-gender-recognition-law-oct2017.

[88] See http://www.regeringen.se/pressmeddelanden/2016/04/regeringen-tar-initiativ-till-lagforslag-om-ersattning-for-personer-som-steriliserats-i-samband-med-konsbyte/.

[89] Submission by the Swedish Federation for Lesbian, Gay, Bisexual, Transgender and Queer Rights (RFSL), June 2018.

Right to gender recognition

61. In September 2017, the High Court of Botswana found that the refusal of the Registrar to change a trans man's gender marker on his national identity card was unreasonable and violated his rights to dignity, privacy, freedom of expression, equal protection of the law, freedom from discrimination and freedom from inhumane and degrading treatment.[90] In Kenya, the High Court held in 2014 that trans persons had the right to government-issued documentation that bore their name (where their name had been legally changed) and with the gender marker removed.[91] The legal grounding was, however, limited to instances in which the law did not explicitly require that a gender marker be included in the document. In addition, in February 2017, the High Court ordered the Principal Registrar of Persons to effect the name changes of five trans persons in their identity documents, and in late 2017, the High Court awarded them 30 million Kenya shillings in damages after the Office of the Principal Registrar repeatedly failed to effect the name changes in their identity documents and failed to implement previous court rulings.[92]

62. The Supreme Court of Chile ruled at the end of May 2018 that trans citizens can change their name and sex on State registries without needing surgery or hormonal treatment to prove their gender identity.[93] In Colombia, the Constitutional Court recognized in February 2017 the right of trans persons to align their name with their gender identity in identification documents.[94] In May 2017, the Constitutional Court of Ecuador, in a case of a trans man who went through gender-affirming surgery, ordered the General Directorate of Civil Registry, Identification and Registration to change the individual's birth registration from female to male. The Court urged the National Assembly to establish a procedure, within one year, for changing the gender marker on the identity cards of trans persons.[95] In 2016, the Constitutional Court of Peru changed the traditional definition of sex applied in the legal system to one that is "within the social, cultural and interpersonal realities" that the person experiences.[96] However, the process for legal recognition is still judicial.[97]

63. Bangladesh, India, Nepal and Pakistan have Supreme Court judgments or Cabinet decisions recognizing a third gender on specific documents, however, in many of these countries implementation measures have been inconsistent. In India, a Supreme Court decision[98] affirms the rights of trans persons to identify as male, female or as a third gender identity, but it is reported that eligibility criteria are imposed through administrative practices, including the requirement of evidence of gender-affirming surgeries in order to amend details on a passport.[99] In 2007, the Supreme Court of Nepal required that the Government recognize a third gender based on self-determination and without medical requirements, a commitment resulting from recognition of a third gender in the Constitution. It remains, however, focused

[90] See https://www.southernafricalitigationcentre.org/2017/09/29/press-release-botswana-high-court-rules-in-landmark-gender-identity-case/.

[91] *Republic v. Kenya National Examinations Council and Ex-Parte Audrey Mbugua Ithibu*, case No. 147 of 2013.

[92] Submission by Kenya Human Rights Commission and East Africa Trans Health and Advocacy Network, June 2018.

[93] See www.pjud.cl/noticias-del-poder-judicial/-/asset_publisher/kV6Vdm3zNLWt/content/corte-suprema-determina-cambio-de-nombre-y-sexo-registral-de-persona-transgenero.

[94] Submissions by Colombia and Colombia Diversa, June 2017. See also Constitutional Court, judgment C-114 of 2017.

[95] Organic Law on the Management of Identity and Civil Data, art. 76.

[96] Constitutional Court of Peru, case No. 06040-2015-PA/TC; and submission by Centro de Promoción y Defensa de los Derechos Sexuales y Reproductivos (PROMSEX), June 2017.

[97] Chiam and others, "Trans legal mapping report".

[98] *National Legal Services Authority v. Union of India*, 15 April 2014.

[99] Schedule III, Passport Rules, 1980.

solely on a third gender identity, with no option for trans women to be recognized as female or trans men to be recognized as male.[100] On 23 January 2017, the Supreme Court directed the Government of Nepal to develop a policy enabling trans people to change their name.[101] In Thailand, the Administrative Court ruled that the Ministry of Defence should use non-stigmatizing language when granting trans women exemption from military service. As a result of the ruling, it was decided that the Military Recruitment Department would refer to persons whose "gender does not match their sex at birth" in exemption documents.[102] The previous practice was to describe trans women as suffering from a "permanent mental disorder" on the form used to exempt them from military service.[103]

64. In the Netherlands, the Limburg District Court of Roermond found on 28 May 2018 that the State is required under national and international standards to provide a way for persons to legally identify as neither male nor female, on the basis of self-determination.[104]

Removal of abusive requirements

65. In 2014, the Supreme Court of India stated that trans people are not required to undergo surgeries as a precondition for changing their gender under Indian law (*National Legal Services Authority v. Union of India*).[105] However, the decision has not been applied consistently.[106] In 2014, the Constitutional Court of Croatia[107] ruled that an 18-year-old man who had followed hormonal therapy and had lived in his self-determined gender for a long time be allowed to change his personal documents without undergoing sterilizing surgery and, as a result, several bodies, including the Ministry of Health and the National Health Council, amended their procedures to reflect the new jurisprudence.[108] On 30 November 2017, the Constitutional Court in Turkey annulled the sterilization requirement in the Civil Code.[109]

Child's right to identity

66 Argentina was the first State to recognize a child's right to change gender identity through a landmark court decision in 2007. The judge based his decision on a section of the country's Civil Code that recognizes the psychological capacity of minors to decide on matters affecting their body and article 12 (right to be heard) of the Convention on the Rights of the Child.[110] In Chile, based on the right to dignity,

[100] Asia Pacific Transgender Network and UNDP, "Legal gender recognition", pp. 32–34 and 40.

[101] Asia Pacific Transgender Network and UNDP, "Legal gender recognition", p. 32.

[102] UNDP and Ministry of Social Development and Human Security of Thailand, "Legal gender recognition in Thailand: a legal and policy review", May 2018. Available at http://www.th.undp.org/content/thailand/en/home/library/democratic_governance/legal-gender-recognition-in-thailand--a-legal-and-policy-review.html.

[103] Ibid.

[104] See https://nltimes.nl/2018/05/28/dutch-court-grants-roermond-resident-gender-neutral-passport.

[105] Submissions by Alternative Law Forum and Varta Trust, June 2017.

[106] UNDP, "Leave no one behind: advancing social, economic, cultural and political inclusion of LGBTI people in Asia and the Pacific", 2015, p. 33; see also Asia Pacific Transgender Network and UNDP, "Legal gender recognition", pp. 39 and 47.

[107] See https://narodne-novine.nn.hr/clanci/sluzbeni/2014_04_46_872.html.

[108] LGBTI Equal Rights Association for Western Balkans and Turkey (ERA), PINK Embassy Albania, Streha LGBT (Shelter), Pro LGBT, Centre for Equality and Liberty of the LGBT community in Kosovo (CEL Kosova), Subversive Front, Coalition Margins, Association Spectra, Egal, Gayten — LGBT, Legebitra, TransAkcija Institute, Pembe Hayat and Social Policies, Gender Identity, and Sexual Orientation Studies Association (SPoD), "Report on legal gender recognition in the Western Balkans and Turkey".

[109] See https://transgenderfeed.com/2017/12/24/turkey-court-removed-compulsory-sterilization-legal-gender-change-landmark-ruling/.

[110] Submission by Child Rights International Network to the mandate holder.

equality and privacy, and the principle of the best interests of the child, the Supreme Court recognized in 2016 the right to gender identity of a 5-year-old girl by ordering a health facility to register her according to her identity.[111]

3. Executive action

67. Uruguay put in place a number of policies and programmes to accompany and build on the legal gender identity recognition law. In particular, it recognized that trans people face a range of obstacles to exercising their rights under the law, including economic obstacles and administrative hurdles, and it therefore created a specific programme designed to help trans people navigate the law, linked to schemes to access social security programmes as well as employment opportunities.[112] Similarly, in June 2016, the Ministry of Justice of Thailand indicated that it intends, in the short term, to develop and issue guidelines on the protection of the rights of trans people in prison, in the context of a wide range of policies to combat violence and discrimination, including in the education, employment, water and sanitation, housing, health-care, social services and civil sectors.[113] Importantly, such guidelines encompass all trans people, whatever their gender identity or expression, and whether or not they have had gender-affirming medical interventions or obtained legal recognition of their gender identity.

68. In the Russian Federation, the Ministry of Health issued a decree on 22 January 2018 on the approved standards and procedure for the issue of a sex reassignment certificate. The decree simplifies and speeds up the gender recognition procedure, allowing for the matter to be settled out of court.[114]

69. In Kyrgyzstan, a manual on standards of care for trans people approved by the health ministry in 2017 recommends gender recognition without surgical requirements.[115] In Montenegro, the law on national registers and the law on central registers of population provide for the right of trans persons to change gender marker in cases of "sex change".[116] The legislation, however, lacks clarity regarding the procedure and this may lead to free interpretation by the Ministry of Internal Affairs, which requires a person to undergo gender-affirming surgery and bring medical "proof".

70. The Government of Bangladesh provided official recognition to hijras through a cabinet decision in 2013, which provides, inter alia, for the possibility of reflecting their gender identity in passports and other identity cards. There are, however, implementation difficulties, with additional proof and medical tests required. In

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[111] Submissions by Fundación Diversencia, Fundación Iguales and Organizando Trans Diversidades (OTD), June 2017. See also http://www.pjud.cl/noticias-del-poder-judicial/-/asset_publisher/kV6Vdm3zNEWt/content/corte-suprema-confirma-fallo-y-ordeno-a-clinica-incorporar-identidad-de-menor-transgenero-en-ficha-clinica.

[112] OHCHR, "Born free and equal: sexual orientation and gender identity in international human rights law" (New York and Geneva, 2012).

[113] Second experts' meeting held in Thailand during the consultation held on 15 June 2016 on the report by UNDP and the Ministry of Social Development and Human Security of Thailand, "Legal gender recognition in Thailand: a legal and policy review".

[114] Transgender Legal Defense Project, "Transgender people in Russian Society", p. 4.

[115] See http://www.labrys.kg/ru/library/full/27.html.

[116] LGBTI Equal Rights Association for Western Balkans and Turkey (ERA), PINK Embassy Albania, Streha LGBT (Shelter), Pro LGBT, Centre for Equality and Liberty of the LGBT community in Kosovo (CEL Kosova), Subversive Front, Coalition Margins, Association Spectra, Egal, Gayten — LGBT, Legebitra, TransAkcija Institute, Pembe Hayat and Social Policies, Gender Identity, and Sexual Orientation Studies Association (SPoD), "Report on legal gender recognition in the Western Balkans and Turkey".

addition, requests to change names on educational documents have been rejected by the authorities who asked for medical tests demonstrating the applicant's hijra status.[117]

71. China provides a clear process for trans people to change gender markers on official identity documents from male to female or vice versa. However, eligibility criteria place very significant limitations on access to gender recognition, including by requiring proof of gender-affirming surgeries, psychiatric diagnoses and third-party consent, and the requirement of a clean criminal record is also problematic in practice given the criminalization of sex work. There are no options in China to select a gender marker other than female or male, for those who identify as non-binary or as a third gender identity.[118]

72. Pending the adoption of legislation, the Federal District of Mexico City adopted a decree on 5 February 2015, amending the Civil Code of the Federal District, allowing people to modify the sex markers on their identity documents through a simple administrative procedure.[119] In 2017, the civil registry of Mexico City allowed a 6-year-old trans child to change her name and gender marker through an administrative process without involving a court, doctor or psychologist.

73. In New Zealand, as a result of a policy change adopted in November 2012, all persons can choose to have their gender in their passport marked as male (M), female (F) or as a third (X) category, based solely on self-determined identity.[120] This good practice also applies to children under the age of 18, although they explicitly require a statutory declaration indicating the support of a parent or legal guardian and a registered counsellor or other health professional. The New Zealand Transport Agency adopted the same approach for driver's licence records in 2013.[121] The practice of adopting an "X" gender marker based on self-identification has been adopted in Malta (all official documents from September 2017), Canada (all official documents from the end of August 2017) and certain states of the United States of America.

4. Other State action

74. On 14 May 2018, the Supreme Electoral Tribunal of Costa Rica, which is independent from all other branches of the State, announced that citizens will now be able to change their name according to their gender identity and have that name reflected on their identity document. The decision was made in a session at which the members of the Tribunal analysed advisory opinion OC-24/17 of the Inter-American Court of Human Rights.

V. Recommendations

75. **These recommendations should be read in conjunction with those included in previous reports of the mandate holder to the Human Rights Council and the General Assembly insofar as they are relevant to the analysis and conclusions presented above.**

[117] UNDP, "Leave no one behind", p. 33; and Asia Pacific Transgender Network and UNDP, "Legal gender recognition", pp. 31 and 38.

[118] Asia Pacific Transgender Network and UNDP, "Legal gender recognition", pp. 34 and 36; and submission by Common Language, June 2017.

[119] Submission from National Human Rights Commission, June 2017; and joint submission from Asistencia Legal por los Derechos Humanos (ASILEGAL), El Clóset de Sor Juana, Fundación Arcoiris and Balance, May 2017.

[120] Submission by New Zealand Human Rights Commission. See also http://www.passports.govt.nz/Transgender-applicants.

[121] See https://www.nzta.govt.nz/driver-licences/renewing-replacing-and-updating/updating-your-licence/.

76. **To address violence and discrimination based on gender identity States must adopt, as relevant, laws, policies and judicial decisions. The Independent Expert strongly recommends that States ensure that these measures are evidence-based, and that the relevant communities, peoples or populations, as well as civil society organizations, are involved in their design and implementation, as relevant and appropriate in a democratic society.**

77. **The Independent Expert urges States to:**

(a) **Move swiftly to adopt and implement the elements in the eleventh revision of the International Classification of Diseases that relate to the removal of the trans categories from the chapter on mental and behavioural disorders, including the adoption of all measures conducive to eradicating the conception of gender diversity as a pathology from all aspects of everyday life;**

(b) **Facilitate the analysis of available evidence surrounding the diagnosis of "gender incongruence of childhood" in the eleventh revision of the International Classification of Diseases in the light of the rights of the child to gender identity and emerging autonomy and the vigorous framework for protection existing in the nearly universally ratified Convention on the Rights of the Child, a process in which all relevant stakeholders, including the populations affected, are encouraged to participate and of which the mandate holder will remain seized, given its importance and relevance to the objectives of Human Rights Council resolution 32/2.**

78. **In relation to legislative measures, the Independent Expert recommends States to:**

(a) **Ensure that laws and regulations provide marriage equality to trans people on an equal basis with other persons under the jurisdiction of the State and that existing laws and regulations governing the institution of civil marriage are clarified and extended to encompass trans persons on an equal basis;**

(b) **Review laws and policies that exacerbate police abuse and harassment, extortion and acts of violence against people based on gender identity, in particular, laws based on public decency, morals, health and security, including those on begging and loitering, and laws criminalizing conduct seen as "indecent" or "provocative", including laws criminalizing sex work;**

(c) **Enact hate crimes legislation that establishes transphobia as an aggravating factor for the purpose of sentencing; and adopt legislation in relation to hate speech on the grounds of gender identity.**

79. **In relation to public policies, the Independent Expert exhorts States to:**

(a) **Take measures to improve the health and well-being of trans persons and guarantee their access to good-quality health-care services and health-related information, which includes giving consideration to establishing the provision of gender-affirming care as a State obligation not dependent on a diagnosis, taking into account the best practices identified in the present report;**

(b) **Adopt all measures necessary to eliminate the social stigma associated with gender diversity, including the development, implementation and evaluation of an education and sensitization campaign, and in particular, all measures necessary to protect trans and gender-diverse children from all forms of discrimination and violence, including bullying, by raising public awareness and implementing safety and support measures;**

(c) **Train State agents in all sectors, including health, education and justice, on the appropriate protocols to adopt and responses to provide in**

interactions with and the provision of services to trans and gender-diverse persons, to which end abundant best practices exist at the international level as a basis for bilateral and multilateral cooperation activities;

(d) Adopt measures to protect defenders and supporters of the rights of trans and gender-diverse persons from attacks, intimidation and other abuses and to create safe and enabling spaces for their work.

80. **In relation to access to justice, the Independent Expert recommends that States adopt all measures necessary to prevent, investigate and punish violence and discrimination based on gender identity perpetrated by both State and non-State actors, as well as to provide reparations to victims, regardless of whether the violence occurred in the public or the private sphere.**

81. **Furthermore, the Independent Expert urges States, through all appropriate and relevant means at its disposal, to:**

(a) Enact recognition systems for the gender identity of trans and gender-diverse children, taking into account the best interests of the child as a primary consideration and respect for the child's right to express views in accordance with age and maturity, in line with the Convention on the Rights of the Child (arts. 3 (1) and 12 and general comments Nos. 12 and 14) and, in particular, in keeping with the safeguards established pursuant to article 19 of the Convention, which must not be excessive or discriminatory in relation to other safeguards that give recognition to the autonomy and decisional power of children of a certain age in other areas. States should also fulfil their obligation to ensure to the maximum extent possible the survival and development of the child (art. 6 and general comment No. 5) and the creation of an environment that respects human dignity;

(b) Eliminate abusive requirements as prerequisites for change of name, legal sex or gender, including forced, coerced or otherwise involuntary sterilization; medical procedures related to transition, including surgeries and hormonal therapies; undergoing medical diagnosis, psychological appraisals or other medical or psychosocial procedures or treatment; requirements relating to economic status; health; marital, family or parental status; and any third-party opinion. This should extend to ensuring that a person's criminal record, immigration status or other status is not used to prevent a change of name, legal sex or gender;

(c) Carefully review the reasoning behind the gathering and exhibition of certain data, and the rules governing data management, which must include separate considerations for the need to gather and the need to exhibit, as well as rigorous adherence to risk assessment and management considerations under the "do no harm" principle, and the participation of the affected populations and communities in the design, implementation and evaluation of the data-gathering systems. States must refrain from gathering and exhibiting data without a legitimate, proportionate and necessary purpose and ensure that, when data must be collected, it should be done on the basis of self-determination, while respecting privacy and confidentiality;

(d) Enact gender recognition systems concerning the rights of trans persons to change their name and gender markers on identification documents. The procedure involved should ensure due respect for free and informed choice and bodily autonomy. In particular, taking into account identified best practices, the processes should:

(i) Be based on self-determination by the applicant;

(ii) **Be a simple administrative process;**

(iii) **Be confidential;**

(iv) **Be based solely on the free and informed consent of the applicant without requirements such as medical and/or psychological or other certifications that could be unreasonable or pathologizing;**

(v) **Acknowledge and recognize non-binary identities, such as gender identities that are neither "man" nor "woman" and offer a multiplicity of gender marker options;**

(vi) **Be accessible and, to the extent possible, cost-free;**

(e) **Examine seemingly neutral requirements that are prerequisites for change of name, legal sex or gender for potential or actual disproportionate effects in the light of the realities of the trans populations in each given context.**